

SERVED: January 19, 1996

NTSB Order No. EA-4419

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of January, 1996

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Dockets SE-14296 and
)	SE-14301
)	
ALBERTO RIVERA and)	
HELIVAN HELICOPTERS, INC.,)	
)	
Respondents.)	
)	
)	

OPINION AND ORDER

Respondents Rivera and Helivan Helicopters have appealed from the oral initial decision Administrative Law Judge William A. Pope, II, rendered in this proceeding on December 22, 1995, at the conclusion of a seven-day hearing on consolidated appeals taken from four emergency orders of revocation issued by the Administrator.¹ The law judge sustained the Administrator's

¹The law judge dismissed the orders of the Administrator that sought to revoke the airman certificates of respondents Daniel Alvarado (Docket SE-14300) and Leandro Kambe (Docket SE-14299). An excerpt from the hearing transcript containing the initial decision is attached.

allegation that respondent Rivera, in violation of sections 61.59(a)(1) and (2) of the Federal Aviation Regulations ("FAR," 14 CFR Part 61), had caused the intentional or fraudulent falsification of the logbook and commercial pilot certificate application of one of his flight school's students, Marcelo Rodriguez.² The law judge further concluded that although respondent Helivan Helicopters was also answerable for the falsifications, an indefinite suspension of its flight school certificate (No. OVHS225K), rather than revocation, was the appropriate sanction.³ For the reasons discussed below, the appeals are denied.⁴

²FAR sections 61.59(a)(1) and (2) provide as follows:

§ 61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.

(a) No person may make or cause to be made--

(1) Any fraudulent or intentionally false statement on any application for a certificate, rating, or duplicate thereof, issued under this part;

(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, [of] any certificate or rating under this part....

³The indefinite suspension is to continue until such time as respondent Helivan Helicopters satisfies the Administrator, *inter alia*, that "it has in place qualified persons who have complete control over its operations" (Tr. at 1579). The Administrator did not appeal from any of the law judge's rulings, but he has filed a reply brief opposing the appeals filed by respondents Rivera and Helivan Helicopters.

⁴On January 2, 1996, the law judge served an order denying a petition for reconsideration that respondents Rivera and Helivan Helicopters filed on December 23, 1995. In that order the law

The November 14, 1995 Amended Emergency Order of Revocation issued to respondent Rivera alleged, among other things, the following:

1. You are the holder of Airline Transport Pilot Certificate Number 584122923.

2. On or about November (specific date unknown) 1994, you, Mr. Leo Kambe, and Mr. Daniel Alvarado made or caused to be made entries into Mr. Marcelo Rodriguez's logbook to include 40 additional hours so that he could qualify for an oral and practical examination for his commercial pilot certificate.

3. The above mentioned entries in Mr. Rodriguez's logbook were intentionally false or fraudulent in that Mr. Rodriguez's [sic] had not acquired those hours.

4. You personally instructed Mr. Rodriguez to obtain a second logbook so that the false entries could be made.

5. You personally told Mr. Rodriguez that he could obtain a Commercial Pilot Certificate through your school despite his failure to obtain the requisite number of hours needed to even apply for such a certificate.

6. On or about November (specific date unknown) 1994, you, Mr. Leo Kambe, and Mr. Daniel Alvarado made entries into Mr. Rodriguez's application for commercial pilot certificate by indicating that Mr. Rodriguez had completed 150 hours as required by the application, but in fact you knew that Mr. Rodriguez had only acquired

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judge assumed, based on a provision in the Board's Rules of Practice dealing with non-emergency cases (Section 821.47(b), 49 CFR Part 821), that he had authority to entertain the petition because it was submitted before the time for filing a notice of appeal to the Board from his December 22 decision had expired. The law judge's assumption was mistaken. The lack of a parallel provision in our rules for reconsideration by a law judge in an emergency case is not a matter of inadvertence or oversight. It is, rather, a purposeful omission reflecting the judgment that, given the severe time constraints applicable to emergency cases by statute, any and all objections or matters bearing on the law judge's disposition of the case must be presented to the Board within the time allotted for an appeal.

110 hours approximately 40 hours short of what he needed to qualify for an oral and practical examination for his commercial pilot certificate.

7. The above mentioned entries on Mr. Rodriguez's application were intentionally false or fraudulent in that Mr. Rodriguez had not acquired those hours.⁵

The law judge concluded that while respondents Kambe and Alvarado participated in the effort to bring Mr. Rodriguez's logbook up to date so that he could take his commercial pilot certificate check ride, by entering flight time information from a school computer printout respondent Rivera provided to Rodriguez, they were not shown to have been affirmatively aware that any of the entries they made were false. He therefore dismissed, as noted *supra*, the revocation orders issued to them. As to respondent Rivera, however, the law judge concluded the Administrator had met his evidentiary burden of proof on the falsification allegations.⁶

The law judge's decision, which spans almost 100 pages of transcript, meticulously recounts the evidence in the voluminous record and carefully analyzes the conflicting testimony of the parties' witnesses. The conclusions it reaches are unequivocally based on credibility assessments that are fully and persuasively explained and that are reasonably supported by the record as a

⁵Paragraphs 8 through 13 of the complaint concern allegations of an additional intentional falsification in 1993 which the law judge dismissed.

⁶The law judge's conclusion that the Administrator had established that respondent Helivan Helicopters lacked qualification as alleged in the complaint issued to it is predicated on the evidence supporting the charges against its owner-operator, respondent Rivera.

whole.⁷ Respondents' argument that the law judge erred in finding that the Administrator proved his charges by a preponderance of the evidence amounts to no more than an indirect challenge to explicit credibility determinations that have not been shown to be deficient in any way, much less to be arbitrary, inherently incredible, or clearly erroneous, which is the applicable standard. See, e.g., Administrator v. Stewart, NTSB Order No. EA-4387 at 8 (1995). Absent such a showing, it is of no legal significance that the evidence could have been evaluated differently; that is, in a manner that would exculpate the respondents. See Administrator v. Klock, 6 NTSB 1530, 1531 (1989) (A law judge's credibility choices are not vulnerable to reversal on appeal on ground that a more probable explanation for a party's conduct than the one accepted by the law judge was advanced). The respondents' disagreement with the law judge's credibility-dependent findings in this case does not provide a sufficient basis for secondguessing the law judge's resolution of the relevant and crucial credibility issues the case posed.⁸

⁷With respect to respondent Rivera's demeanor, for example, the law judge found that "he gave the appearance of stonewalling and of deceit" (Tr. at 1557).

⁸Respondent Rivera's insistence that there is not a preponderance of evidence in the record to support the falsification charges against him might have some merit if the law judge had not rejected, on credibility grounds, much of his testimony (including, for example, his denial that he had told Rodriguez to purchase a second logbook) and if he had not credited most of Rodriguez's contrary testimony (including his statement that Rivera told him not to worry when Rodriguez advised Rivera that he did not have enough hours to take the commercial pilot exam). This and other circumstantial evidence that Rivera had caused the falsifications was unquestionably

While it is not entirely evident from the record why such a strong animosity developed between respondent Rivera and his flight school's student, Rodriguez, it is essentially undisputed that Rodriguez had paid Rivera over \$39,000 for flight training through his acquisition of a Certified Flight Instructor certificate and that Rivera was unwilling to provide any instruction past the commercial certificate level. Thus, however unlikely it may appear that Rivera would, by falsifying records, jeopardize his career and his school's reputation to get rid of a student he did not like, it would be both consistent with such a motive and in his economic self-interest to make it appear that Rodriguez had more flight experience than he really did. It is also clear that Rodriguez's report to the FAA that Rivera had falsified documents related to his acquisition of a commercial pilot certificate was a double-edged sword that impugned his, as well as Rivera's, qualifications. In any event, nothing in respondents' brief establishes that the law judge did not fully and adequately understand the varied motivations and interests the parties' witnesses may have had for testifying as they did, and, consequently, we perceive no reason to disturb the ultimate conclusions he reached on this record.⁹ We adopt as our own the

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sufficient to establish the Administrator's allegations. See Administrator v. Chirino, 5 NTSB 1661, 1664 (1987) ("We think the Administrator has...proved, through the reasonable inferences to be drawn from the evidence, that respondent 'caused' these entries to be made within the meaning of section 61.59(a).").

⁹On January 12, 1996, respondents filed a response to the Administrator's reply brief, along with a motion asking that we accept it. We will deny the motion, for we do not think the

findings and conclusions of the law judge concerning the charges against respondents Rivera and Helivan Helicopters.¹⁰

Respondents also argue that they were prejudiced in defending against the revocation orders because the law judge did not give them enough time to prepare for the hearing on the issue of qualifications after denying their motion to dismiss the complaint on staleness grounds. This is so, they maintain, because the law judge, following his denial of their motion at the outset of the hearing, only gave them about 47 minutes to interview witness Rodriguez off-the-record and would not advise Rodriguez, who had not been subpoenaed by respondents, that he had to answer their questions. The argument, in our view, is meritless.

The respondents' inability to obtain effective pre-hearing discovery concerning witness Rodriguez's likely testimony was not caused by any insufficiency in the notice the law judge gave them of the need to defend against a charge of lack of qualification.

It was the result of Rodriguez's unavailability prior to the hearing, in that he had been home in Venezuela and could not be compelled to attend a deposition in the United States. While the

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response's purpose is, as it is represented to be, to correct any mischaracterization of the evidence by the Administrator in his reply brief, but, rather, to reassert the contention that the Administrator did not meet his burden of proof. That contention is flawed because, among other things, it essentially treats as dispositive testimony by respondent Rivera which the law judge did not credit.

¹⁰The respondents' request for oral argument is denied. The record and the written submissions on appeal provide an adequate basis for deciding the appeals.

law judge apparently tried to satisfy the respondents' desire to question Rodriguez before he was called by the Administrator as a witness in the case, it appears that Rodriguez chose not to speak to them. Since, however, he was subject to cross examination by respondents once he testified at the hearing and, if necessary, could have been ordered to answer whatever questions they had, we do not think the law judge's prior refusal to so order Rodriguez can be said to have produced any prejudice, as the respondents were really in no worse position than they would have been if the law judge had not interrupted the progress of the hearing even briefly in an attempt to accommodate their desire to obtain some measure of discovery. In any event, respondents did have a full opportunity to question Rodriguez during the hearing and, consequently, were afforded the right to cross-examination that our rules contemplate.¹¹

¹¹If Rodriguez's testimony had produced some surprises that the respondents needed additional time to respond to, the law judge could have granted a continuance, assuming, of course, that the respondents were willing to waive the 60-day deadline applicable to the Board's start-to-finish review of the Administrator's emergency orders. Respondents do not argue here that Rodriguez's testimony contained any such unexpected revelations.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondents' appeal is denied, and
2. The Administrator's orders of revocation, as modified by the law judge, and the initial decision are affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above opinion and order.